No. 14113

In the
United States Court of Appeals
For the Ninth Circuit

UNITED TRUCK LINES, INC., a Corporation, and OREGON-WASHINGTON TRANSPORT, a Corporation, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the District of Oregon finding the defendant-appellant, United Truck Lines, Inc., guilty upon ten counts in a Criminal Information for violation of U.S.C., Title 49 Secs. 306 (a) and 322 (a). It was claimed that the District Court had jurisdiction under Sec. 306 (a), Title 49, U.S.C., which reads in part as follows:

> "(1) Except as otherwise provided in this section and in section 310 (a) of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of

the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *."

And under Sec. 322 (a), Title 49, U.S.C., which reads:

"(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense."

Jurisdiction was claimed over defendant-appellant Oregon-Washington Transport, Inc., upon the ground that it knowingly and willfully aided and abetted said United Truck Lines, Inc., in the aforesaid offense in violation of U.S.C., Title 18, Sec. 2.

Jurisdiction in this Honorable Court to review the judgment of the District Court is provided under Sec. 1291, Chap. 83, Title 28, U.S.C., which reads as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On July 17, 1952, the United States Government, through the United States Attorney, filed a Criminal Information charging in ten counts that United Truck Lines, Inc., hereinafter referred to as appellant, did knowingly and willfully engage in an interstate operation on public highways as a common carrier by motor vehicle, and as such carrier, did transport various shipments on the days mentioned, from Portland, Oregon, or Spokane, Washington, to the McNary Dam site, Umatilla County, Oregon, for compensation without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations as required by Sec. 306 (a), Title 49, U.S.C. Oregon-Washington was charged with aiding and abetting in said offense (R. 3 to 10).

Thereafter, on October 10, 1952, the said defendants (appellants) were duly arraigned upon the information and each entered a plea of not guilty of the offenses charged in each of the ten counts of the information.

At that time, the appellants announced that they intended to file a Motion to Dismiss upon the grounds that the District Court did not have jurisdiction of the cause for the reason that the appellants were not engaging in an interstate operation on public highways in Oregon but were in fact upon a private highway. The District Court requested the defendants and plaintiff to confer in an attempt to arrive at a stipulation of facts upon which the Court could determine the issue of jurisdiction. After several conferences, it was agreed

that the issue to be determined by the Motion to Dismiss depended upon the legal status of a ferry operated by the Umatilla Ferry, Inc. Accordingly, a Stipulation of Facts was agreed upon and filed December 9, 1952, which appears at pages 11 to 20, inclusive, of the Transcript of Record.

As stated in the Stipulation of Facts, appellant United Truck Lines, has certificated authority to operate over the public highways as a common carrier from Spokane, Washington, or Portland, Oregon, to all points and places in Benton County, Washington. The boundary of Benton County extends to the middle of the Columbia River which is the boundary line of the State of Washington. Umatilla County, Oregon, the terminus of the operation alleged to have been conducted, lies directly across the river from Benton County. The McNary Dam site, the specific destination of the alleged operation in Umatilla County, Oregon, is situated on the McNary Dam Reservation which is a federal reservation, lying on both the Oregon and Washington sides of the Columbia River.

Appellant United served the Washington side of the McNary Dam project as a motor carrier until the center of construction activities shifted to the Oregon side of the river. In order to be able to continue to serve the Oregon side of the project, it became necessary to utilize a ferry operating across the Columbia River between a point in the approximate vicinity of Plymouth (Benton County), Washington, and a point on a government-owned island (Umatilla Island) on the Oregon side. In order to continue to stay on private roads in

Oregon, Appellant United, by permission of the federal government, constructed its own roadway extending from the ferry landing on the beach eastward on the reservation property to the construction site of the dam —a distance of some 1,000 feet (R. 20).

As is stated on page 20 of the Transcript of Record (Stipulation of Facts), the Commission has always recognized that a carrier may serve a territory or areas not authorized in its certificate if only private roads are used in the beyond operation. Therefore, the operation by Appellant United was perfectly lawful upon the private roadway it had constructed on the Oregon side, providing it had not traversed a public highway before reaching the private road.

Therefore, the single offense alleged was that appellant United had operated on a public highway from the middle of the Columbia River to the shore on the Oregon side while it was actually on the ferry.

It was further stipulated that the ferry is not a connecting link or continuation of the highway system of either Washington or Oregon nor does it hold a license, franchise, or certificate of any kind from any governmental body, agency, or otherwise (R. 17, 12).

Based primarily upon these two facts, which the court affirmatively found in its opinion (R. 20 b), appellants maintained that this ferry could not be a public ferry therefore, it was not a public highway. Despite the existence of these two factors, the District Court in its opinion of January 26, 1953, denied the motion for dismissal.

Thereafter, a trial was held on May 28, 1953, as to the

merits of the offense charged which resulted in a finding of guilty by the Court for the reasons stated in its Oral Opinion of August 28, 1953. On August 28, 1953, Judgment and Commitment was pronounced from which a Notice of Appeal was filed September 4, 1953, setting out that appellants appealed only from the ruling of the District Court that the ferry is a public highway within the meaning and intent of Sec. 306 (a), Title 49, U.S.C.

SPECIFICATION OF ERROR

1. The trial court was in error in holding that the operation from the Washington boundary at the middle of the Columbia River to the Umatilla Island Government Reservation on the Oregon shore was conducted over a public highway within the meaning of Section 206 (a) of the Interstate Commerce Act.

ARGUMENT FOR APPELLANTS

The foregoing Specification of Error had its inception in three erroneous holdings by the trial court:

1. In holding that a "ferry" is a "highway."
2. In holding that this ferry was a "public" highway.
3. In holding that appellants were engaging in an "interstate operation" on the ferry.

Before proceeding to a discussion of the three foregoing premises upon which the order under review is based, it must clearly be established that the issue facing the trial court was primarily based upon a construction or interpretation of a statute. Perhaps here

lies the most cardinal error of the trial court in that it applied a liberal construction to a statute that was penal in nature.

The information, as stated before, charges the defendants with knowingly and willfully engaging in an interstate operation on a public highway as a common carrier by motor vehicle in violation of Section 306 (a), Title 49, U.S.C., set forth above. Section 322 (a), Title 49, U.S.C., set out above, makes it a federal crime for any person to knowingly and willfully violate any provision of the Motor Carrier Act. Therefore, these two sections, when read together, are penal in nature. It is well settled in this court that penal and criminal statutes are to be strictly construed. Acts imposing forfeitures or penalties are always strictly construed as against the government and liberally as to the defendants and the courts may not search for an intention or inclusion not suggested by the plain words of a penal statute. *Fasulo v. U. S.,* 47 S.Ct. 200, 272 U.S. 620, 71 L.ed. 443; *Greely v. Thompson,* 51 U.S. 225, 10 How. 225, 13 L.ed. 397. This rule applies with equal force to the Interstate Commerce Act even though it is both remedial and penal in nature, for it is possible to apply a liberal construction to its remedial portions and a strict interpretation to its penal provisions. The case of *U. S. v. Fruit Growers Exp. Co.,* 279 U.S. 363, 49 S.Ct. 374, 73 L.ed. 739, involved a review of an indictment against a railroad for misreporting or falsifying records required to be kept pursuant to Part I of the Interstate Commerce Act under penal liability of Section 10 (1), Title 49, U.S.C. (which is practically identical to Section 322 (a) *supra*). The Supreme Court af-

firmed the judgment in favor of the defendant railroad and held that the provisions of the Act imposing a penalty of fine or imprisonment are to be given a "reasonably strict construction" to effect the particular purpose Congress had in mind.

Hence, it may be adopted as the law of this case, that construction of a statute imposing criminal penalties, such as the one of which violation is here charged, is subject to a reasonably strict interpretation. By this, we do not mean that the words must be strained or distorted in order to exclude their plain meaning or legislative intent. But, by the same token, the coverage of the words cannot be supplied by implication or liberally construed in favor of the plaintiff. *U. S. v. Peoples,* 50 F.Supp. 462; *Fleming v. Fir-Tex Sales Corp.,* 69 F. Supp. 902.

The purpose of the construction indulged in by the trial court was not to effect a broad public purpose in aid of obvious congressional intent in a civil proceeding, but purely to bring the appellants within its implications for purposes of penal sanction. As will be seen in the following discussion relative to a construction of the statute under review, inclusion of a "ferry" under the words "public highway" could only be achieved by a liberal and unrealistic construction fully at odds with well settled legal definitions of the terms.

The general rule is laid down in 37 Am. Jur. Motor Carriers, Sec. 24, that "the Commission should not assume jurisdiction over motor transportation unless it clearly appears by the language of the statute that it has such jurisdiction." A Commission only derives its

power to act from the legislative authority conferred upon it and has only express powers and those implied powers absolutely necessary to carry out the express. No authority will be implied in a matter involving jurisdiction.

Having determined that a statute imposing penal sanctions is subject to a reasonably strict construction, let us now turn to a construction of the particular statute under which this proceeding was instituted.

This Ferry Is Not a Highway

The Stipulation of Facts beginning on page 11 of the Transcript of Record establishes that this "boat" is a "ferry."

Webster defines a ferry in its physical sense as a "place of crossing or a place or passage where persons or things are carried across a river in a boat." "A vessel used in ferry service; a ferry boat."

Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels for hire.

Hence, we see that a ferry is passage over water by boat. There cannot be a ferry without some kind of boat or vessel in which men or things are carried. Therefore, it is a physically different thing than a highway.

A "highway," according to the most commonly accepted definitions is a way open to the public at large, for travel or transportation, without distinction, discrimination, or restriction. Its prime essentials are the

right of common enjoyment on the one hand, and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway.

The term "highway" is generic and includes all public roads in any ordinary mode or by any ordinary means which the public has a right to use either conditionally or unconditionally. In its broad or general sense, it may include turnpikes, toll roads, bridges, canals, and navigable waters and when appearing in a general law, it will ordinarily be regarded as having been used by the legislature in its general sense. Its meaning, however, may be limited to its strict sense by the subject matter of the statute in which it is employed. 25 Am. Jur., Highways, Section 5. For example, in its broad and general sense a highway includes canals and navigable water. Yet, no one would suppose that a state law requiring payment of a license fee based upon gross weight for use of the state highways would apply to barges plying the navigable waters of the state.

A "highway" is defined in Part II of the Interstate Commerce Act, as used in Sec. 306 (a), in Section 303, Title 49, U.S.C., as follows:

> "The term 'highway' means the roads, highways, streets and ways in any state."

Can a ferry in its physical sense come within these express inclusions?

Obviously, this boat or vessel is not a "road" or a "street" under any definition because it is a physically different thing.

It further cannot be a "highway" because it is clear

that Congress by including the word "highway" under a description of the very word it was defining, had reference to legally created and maintained state highways as that word is used in its ordinary sense.

It also must be assumed that by reading the description as a whole, the inclusion of the word "ways" was intended to be a more detailed description of passages, paths, alleys or other approaches over land. The reason for this is that the Congress in each of its prior descriptions referred to a passage over land so there is no logical reason to assume that inclusion of the word "ways" was intended to suddenly take in a whole class of other passages such as canals, ditches, lakes, lagoons, etc., in an act that was dealing *only* with land-borne motor carrier operations. It is fundamental that where the legislature has undertaken to describe particularly what is to be included in a statutory definition other inclusions must not be implied into the definitive text.

It is also obvious that Congress meant to include as highways only those legally recognized and maintained as such in each state because the particular section under construction defines a "highway" as the highways, streets and ways *"in any state."* The State of Oregon, through its legislature, has specifically defined the term "Highway" under Section 336.005 of the Oregon Revised Statutes to mean:

> " 'State Highway' means any road or highway designated as such by law or by the State Highway Commission pursuant to law and includes both primary and secondary highways."

And in Section 366.010:

> "(2) 'Road' or 'highway' includes necessary

bridges and culverts, and city streets, subject to such restrictions and limitations as are provided."

It will be seen that the Oregon Code includes only "roads or highways" when designated as such by law, or by the State Highway Commission pursuant to law, and intentionally limits "roads" or "highways" to land ways including only necessary bridges, culverts and city streets. It does not include canals; waterways, navigable or non-navigable; ferries or toll roads or other ways. Since ferries are not highways in Oregon, and the statute makes the definition dependent upon recognized highways "in any state" this ferry was not a highway in Oregon.

The weight of authority in Oregon, Washington, and in all state or federal jurisdictions that have specifically passed upon the point is that a ferry, as a boat or a vessel, of and by itself, is not a highway in its legal sense. The best case dealing with the subject to illustrate this premise is the leading case of *Menzel Estate Co. v. City of Redding,* 178 Cal. 475, 174 Pac. 48. In this case, the California Supreme Court held that a ferry itself is not a public highway even though the place where it is used may be one in a literal sense. The following language delineates this basic distinction:

"But a ferry is not in a strict technical sense, under our law, a highway * * *.

"And there is no authority in this state that I have been able to find where a *ferry and ferry franchise becomes or could become a public highway,* and the weight of authority in other states holds *only* that a ferry is a connecting link between two public highways. * * * " (Italics ours)

Another leading case pointing out the distinction is *Chick v. Newberry and Union County,* 27 S.C. 419, 3 S.E. 787, in which a cause of action brought under a statute authorizing damages for defects in any "highway, causeway or bridge" was held not to include a ferry. In construing the word "highway," the court said:

> "But the question here is one of construction—in what sense did the legislature use the word 'highway'? As indicated in the definition given above, the ordinary meaning of the word 'highway' is a passage on land. A bridge spannning the water, and connecting the banks, would seem nearer to being a 'highway' than a ferryboat; and, as it was deemed proper or necessary to express the case of a 'bridge' it would seem to be a strained construction that it was unnecessary to mention a 'flat-boat' or ferry, for the reason that it was already included in the word 'highway.'

The Washington Supreme Court has repeatedly held that ferries and ferry premises including approaches are not highways or parts of highways. Among the decisions which most clearly express the foregoing rule is the case of *Norton v. Anderson,* 164 Wash. 55, 2 P. (2d) 266. In that case the plaintiff was injured on a ramp or approach leading to a ferry which was owned by King County (one of the defendants) and operated for the County by Anderson (the other defendant). The County contended that it was not under the legal duty that a ferry operator normally bears, because according to the County's contention the ramp was a part of the public street or highway. The Supreme Court dis-

posed of the County's argument in the following words (164 Wash. 61):

> " * * * The ferry-landing approach upon which the respondent was injured is, we must assume, a reasonably necessary adjunct to the ferry system. It belongs to the county as a part of that system, and is not a part of an ordinary highway or street. *Anderson Steamboat Co. v. King County,* 84 Wash. 375, 146 Pac. 855. See, also, *Hart v. King County,* 104 Wash. 485, 177 Pac. 344."

In the case of *Corbaley v. Pierce County,* 192 Wash. 688, 74 P.(2d) 993 (which was also a personal injury case upon a wharf which was used by Pierce County in connection with ferry operations), the court said at 192 Wash., page 698:

> "It is prejudicial error for the trial court to instruct the jury that the wharf involved was a public highway. *Gregg v. King County, supra; State ex rel. Wauconda Inv. Co. v. Superior Court,* 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E, 1076."

In the state of Oregon, we have seen that the legislature has specifically defined what is to be included under the term highways. There are no Oregon cases which hold a ferry to be a highway *per se.* Cases that have dealt with the subject have only held that in a literal sense a ferry is a continuation of a highway when it is a necessary connecting link between two highways. The early case of *Mills v. Learn* (1852) 2 Ore. 215, points out that ferries are highways in a literal sense only when they are a necessary continuation of a highway in the following language:

> "After a full examination of the authorities, we re-affirm the conclusions then made, that when a

public highway crosses a stream of water, it is not interrupted, but the water and soil beneath it, within the limits of the road, are a continuous part of the road, *that when necessary* for the proper use and enjoyment of the highway by the public, the ferries and bridges are also parts and parcels of the road." (Italics ours)

Right at this point, the basic and fundamental distinction between the cases that hold a public ferry to be a public highway and those that hold a ferry not to be a highway *per se* must be noted.

This is, that in those cases so holding the ferry was admittedly a direct, necessary, and continuous link in a state highway system and also the status of the boat itself was not in issue.

A careful review of all state and federal decisions clearly establishes that the question of whether or not a "ferry" can be a "highway" depends first of all, whether or not it is maintained and established as a continuation of, or necessary link in, a highway. The concept that a ferry is a highway when it is an actual continuation of a public highway has been applied only where it has made connections with public thoroughfares at each terminus.

The leading authority in this jurisdiction for this proposition is *United States v. Canadian Pac. Ry.,* 4 F.Supp. 851, in which the issue of the legal status of certain boats as vessels or ferries was directly in issue. In this case the defendant operated daily service in steamer type vessels which also carried automobiles as incidental to its passenger service between Seattle and Victoria or Vancouver, B. C. The defendant had no li-

cense or franchise to operate a ferry line. The court found that the defendant's boats were not international ferries based upon three concurrent tests. One, the conventional sea-going construction of the vessels; two, the character of the service provided in that it did not furnish a connecting link for highway traffic; three, the absence of compliance or attempt to comply with local ferry laws.

In passing upon the second factor, the court said:

> "Nor does the service furnish a connecting link for highway traffic. Of course, highways emanate from each city terminus of the steamship line where ships berth at the ocean docks. A ferry may be said to be a necessary service by specially constructed boat to carry passengers and property across rivers or bodies of water from a place on one shore to a point conveniently opposite on the other shore and *in continuation of a highway making connections with a thoroughfare at each terminus.* Anciently, a ferry performed the same service of carrying people and cargo across a river, small lagoon, or narrow lake as the water craft was later, and is, carried by bridge structure above the water. This service was extended to larger lakes and other larger bodies of water in extension of, or forming a connecting link to, highways." (Italics ours)

The common law concept of a ferry was very early recognized by the Supreme Court of the United States in *Conway v. Taylor,* 1 Black 629, 17 L.ed. 201, wherein the court quoted with approval the following principle:

> "A ferry is in respect of the *landing place, and not of the water.* The water may be to one, and the ferry to another." (Italics own)

The foregoing case involved the right of the state of Kentucky to grant an exclusive ferry franchise, which right was upheld under the principle that the police power of a state extends to the establishment, regulation and licensing of ferries on a navigable stream, being the boundary between two states, if not an undue burden upon interstate commerce.

The concept that the status of a ferry as a highway is determined by the character of service it renders was continued in the leading case of *St. Clair County v. Interstate Sand, etc., Co.,* 192 U.S. 454, 466, 24 S.Ct. 300, 48 L.ed. 518. In this case, the Supreme Court was concerned with the power of the state of Illinois to require a railroad company to secure a license for transporting railroad cars in interstate commerce from the county of St. Clair in Illinois to the Missouri shore and return. The court distinguished between "transportation" upon waters between two states and a simple "ferry," and held that the police power of the states does not extend to "transportation" by water across a river which does not constitute a ferry in a strict technical sense. By "strict technical sense" the court said it meant:

> "A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them."

The most succinct statement of the fundamental proposition that a public ferry must be in continuation of a public highway is contained in *State v. Wie-*

thaupt, 231 Mo. 449, 565, 133 S.W. 329, which appears as follows:

> "The idea of a ferry presupposes a road travelled by the public which is bisected by the water course, the ferry serving in a different way, the same purpose that is served by a bridge. As the bridge is made for the road, not the road for the bridge, *so is a ferry made for the road, not the road for the ferry; the ferry is the incident, the road is the principal."* (Italics own)

Having clearly established that a ferry is a highway only when it is a continuation of, or a necessary link in a highway system, let us determine the status of the roads leading up to the ferry in the instant case. The Stipulation of Facts with respect to the status of the ferry, beginning at page 12 of the Transcript of Record, states the following facts. The ferry corporation holds a lease on a plat of land for a distance of some 500 feet from the ferry landing to a county highway as a means of ingress and egress between the ferry landing and the county highway. The ferry company holds a lease to lands on the Washington side extending from the ferry landing to a county highway for a distance of some 1500 feet. These roads are maintained solely for the ferry patrons and are not maintained by the state or county.

The trial court in its oral opinion of January 26, 1953 (R. 20), stated that even though the ferry operates "from approaches on both the Oregon and Washington sides of the Columbia, which are on private property," the ferry is still a public highway. The use of the word "approaches" in the opinion above is perhaps

not sufficiently explanatory of the actual situation in this case because these roads leading up to the ferry landings are not approaches as that word is usually understood. As stated in the opinion of the trial court dated August 28, 1953, beginning on page 21 of the Transcript of Record, the ferry on the Oregon side docked on property of the United States Government, namely, Umatilla Island, which was a part of the McNary Dam reservation. The road to which the approach from the ferry connected on the Oregon side is known as the Oil Depot Road which is maintained solely for access to a private oil tank farm leased from the United States and is not in any way owned by the State of Oregon. Hence, the roads from the landings, which are itinerant, are not a part of the public highways system of the State of Oregon, nor are they maintained by the state as set out in the stipulation.

The road leading from the ferry landing on the Washington shore of the river is likewise leased by the ferry company and maintained by it. The land is privately owned by the Switzer Estate and leased upon a yearly basis. From the ferry landing to where the private road connects to an unnumbered county road is approximately one quarter of a mile, which county road leads to Plymouth, Washington. This county road is maintained for the sole purpose of a farm-to-market road for the people living in that vicinity and does not lead to the ferry road. Consequently, the roads from the landings, which are itinerant, are not a part of the public highway system of the state of Washington or of any of its political subdivisions, nor are they maintained as such.

They are private roads established upon private property to be used only by ferry patrons. There is no record of any formal dedication and acceptance by grant and they have not been used long enough to accomplish a dedication by prescription through adverse possession or user. In any case, a highway by user or prescription cannot be acquired over lands held in trust by the government for the benefit of the public such as the land on the Oregon side which is owned by the United States Government and managed by the Bureau of Land Management. Nor can such a title be established as against the owner of the reversionary interest in fee on the Washington side. Am. Jur., Sec. 11, Highways. The most that the public could have is an easement by license to use the ferry. They were under the exclusive ownership and control of the ferry, subject only to the rights and uses of passengers and patrons of the ferry. Hence, they were not public highways but private property over and on which only patrons of the ferry had a right of passage. They were not maintained by the state or county. Hence, the prime essentials of unconditional use and the duty of public maintenance were absent which negatived their status as public highways. Am. Jur., Sec. 2, Highways.

Summarily, the facts of Record show that the ferry was not a continuation of, or a necessary link in public highways. Therefore, in a literal sense, this ferry was not a highway. Nor was it a highway in a strict sense because it is a physically different thing.

This Ferry Is Not a Public Highway

Assuming that this ferry was a highway in a literal sense, is it a "public" highway?

The word "public" is not defined in the Act itself. However, since a highway in the ordinary sense is a way open to all the people without distinction it is necessarily public in character, so perhaps the term "public" highway is a tautological expression. The term "public highway" in its broadest sense includes public ways of every description which the public have a right to use for travel. On the other hand, as used in its more limited sense, it does not include railroads, toll roads, or ways of necessity.*U. S. v. Rindge* (D.C. Cal.) 208 Fed. 611, 618.

Whether or not this ferry is a highway within the meaning of the Act, as we have seen, must first of all depend upon whether or not it is an actual continuation of or a necessary link in a highway. Secondly, in order to be a "public highway" it would seem that it must first be a "public ferry." This leads us to the definition of a "public ferry." It has been clearly established in all jurisdictions that a valid franchise is an absolute prerequisite to lawful establishment of a public ferry. 36 C.J.S. Ferries, Sec. 3. The right is a franchise which cannot be exercised without the consent of the state. This point has been expressly settled in this court by your decision in *Canadian Pac. Ry. Co. v. United States,* 73 F.(2d) 831, in which it was held that a franchise is a prerequisite to creation of a public ferry in the following language:

> "At common law a franchise was necessary to the creation of a ferry and as appears from Bou-

> vier, *an integral part of the definition.* * * * In the United States ferries are established by the legislative authority of the states, which is exercised either directly by a special act of the legislature, or through some inferior body to which power has been delegated under the provisions of general law. * * * The power of establishing ferries is never exercised by the federal government, but lies within the scope of those undelegated powers which are reserved to the states respectively'' 25 C.J. Sec. 5, p. 1052. See *Conway, et al. v. Taylor's Executor,* 1 Black (66 U.S.) 603, 17 L.Ed. 191.'' (Italics ours.)

An in the lower court decision (*U.S. v. Can. Pac. Ry., supra*), it was said:

> ''A ferry line is a *creation of local franchise* after finding of necessity, after notice and formal hearing by local authority and may be intrastate, interstate, and by the same token, international.'' (Italics ours.)

The fundamental principle that a public ferry is in relation to the highways and not of the water was continued in the latest federal case of *United States v. Puget Sound Navigation Co.,* 24 F.Supp. 431, which again involved the question of whether certain vessels were ferries within the meaning of a statute exempting international ferries from payment for overtime service of immigration inspectors. The federal court reviewed the prior cases, especially *St. Clair County v. Interstate Sand and Car Transfer Co., supra,* and *United States v. Canadian Pac. Ry. Co., supra,* and held that a ''ferry'' in its legal sense is a continuation of the highway from one side of the water over which it passes to

the other, and partly as a basis for deciding that the vessels in question were not "ferries," stated:

> "And no business of the vessels was done with particular reference to water connections between specific overland highways, of which there are many serving the myriad of communities."

The foregoing was affirmed in *Puget Sound Navigation Co. v. United States* (C.A. 9, Wash.) 107 F.(2d) 73, *Certiorari* denied 60 S.Ct. 608, 309 U.S. 668, 84 L.Ed. 1015.

Since the defendant had no license or franchise to operate a ferry within the boundaries of the state of Washington, it was held not to be a public ferry in the above case.

It is stipulated of record in this case at page 12 of the Transcript of Record that the "ferry company does not hold a license, franchise, or certificate of any kind from any government body, agency, or otherwise."

Since a "public ferry" cannot exist in Oregon, except under the provisions of Chapter 384 of the Oregon Revised Statutes which require a franchise, nor in Washington, except under the provisions of Volume 6, Title 32, Sections 5462-5483, Rem. Rev. Stat. of Washington, it is conclusive that this ferry was not a public ferry. The mere fact that its articles of incorporation empowered it to carry on a ferry business for the public did not bestow upon it a franchise since it has been specifically held in *State v. Portland General Electric Co.,* 52 Ore. 502, 95 Pac. 722, 98 Pac. 160, that no corporation, by virtue of its articles, could acquire a ferry franchise which can be conferred only by a special grant of the state.

Therefore if it was not a "public ferry" it was simply a private ferry. It seems only logical that if it was not a "public" ferry, it could not be a "public" highway since one is indispensible to the other.

The government contended, and the trial court seemed to base its opinion upon the fact, that the character of the service rendered alone made this ferry a public ferry. By this it meant that its conduct made it a common carrier. Whether this ferry is a common carrier or not is immaterial to the legal status of this ferry because since a public ferry is a creation or creature of local franchise, the existence of a lawful franchise is a prerequisite to its status as a public ferry. A ferry operator cannot enlarge his status to that of a licensed public ferry merely by his conduct. The right to keep a public ferry for toll is a franchise in Oregon which cannot be exercised without license or legislative grant, either mediate or immediate, and even a prescriptive right when recognized, is based on a prescription of a grant.

That the existence of a franchise is a condition precedent to the existence of a public ferry in Oregon is firmly established from the following quotation from *Hachet v. Wilson,* 12 Ore. 25, 6 Pac. 652, 653:

> "The principle to be deduced from these authorities of the nature of the franchise, and the uses and purposes for which a ferry is licensed and established, is that a ferry can only exist in connection with some highway or place where the public have rights, *and the grant of a ferry franchise.* The grant of a ferry franchise for the transportation of persons and property across a stream to

and from a place where there is no highway, or in which the public have no rights, would be void and inoperative. The object of a ferry being to connect highways or places in which the public have rights when intersected by streams, it becomes *when licensed and* established, a part of such highway or line of travel between such places." (Italics ours.)

A public ferry cannot exist without a franchise for a public ferry may be operated only with the consent of the state. Like highways, public ferries are for the benefit and convenience of the general public, and their maintenance and operation are governmental functions. *Deans v. Cocnino County,* 17 P.(2d) 801.

A common law ferry is not *per se* a public ferry unless it has a franchise. A franchise is a grant to carry a land highway over water. Without the grant there can be no continuation of the highway as a "public" highway. As seen in the preceding pages a "ferry" is a "highway" in a legal sense only when it connects highways. It does not do so in this case but even if it did, it still could not be a "public" highway since it is not a "public" ferry.

Appellants Were Not Engaging in An Interstate Operation on the Ferry

An interstate operation is defined under Sec. 302, Title 49, U.S.C. as follows:

"(20) The term 'interstate operation' means any operation in interstate commerce."

The term "interstate commerce" is defined under the same section as follows:

"(10) The term 'interstate commerce' means

> commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

As can be seen, the essence of the definition requires a movement from a state to another state. Here, Appellant United had specific authority to serve all of the McNary Dam reservation on the Washington side of the river and it could serve all of the Oregon side of the reservation if no public highways were used. Hence, the transportation which was alleged to have been performed without authority was not an "interstate operation" but a movement from *a state to a federal territory* as the trial court found in its opinion of August 28, 1953 (R. 22).

A movement from a state to a point in a reservation in another state not conducted over public highways of the second state is not a movement in interstate commerce because it is not a movement from one state to another but from a state to a federal territory. The Interstate Commerce Commission has consistently so held as the following quotation from *North Coast Transportation Co., Extension,* MC 224 (Sub No. 6) 3 Federal Carrier Cases, Par. 30, 019 states:

> "Section 202 (a) of the Interstate Commerce Commission Act clearly limits the jurisdiction of the Commission to interstate and foreign commerce. Section 203 (a) (8) of the Act provides, the term 'state' means any of the several states and the District of Columbia. * * * Fort Lewis is not a

state. It is located within and entirely surrounded by the State of Washington."

It follows that a movement from a point within a state to a point in a reservation immediately adjacent to and bordering the same state, which may be performed entirely over private roads within the reservation is not a movement between states but from a state to a territory or reservation and therefore is not interstate commerce. Here it is admitted that all movements were to the reservation on the Oregon side of the river. They were not from one state to another and therefore were not in interstate commerce.

The facts, as found by the trial court on page 22 of the Transcript of Record, disclose that the operation was performed entirely within the confines of the reservation for the reason that the Columbia River was wholly within the McNary Dam reservation. Therefore, at no time was Appellant United within the State of Oregon. Hence, it was not an interstate operation but a movement from a state to a federal territory which is plainly not within the jurisdiction of the Commission as their foregoing decision admits.

CONCLUSION

The trial court, in its opinion set out on page 20 (a) of the Transcript of Record, seemed to feel that the application of a liberal construction to the definition of a public highway was justified, despite the criminal nature of the proceeding, by the inclusion of the words "within the meaning and intent" of the Act.

In the first place, did the Congress mean to include "private ferries?"

In the second place, did the Congress mean to include "ferries" when it specifically said "public highways" and then specifically defined them in Section 303, Title 49, U.S.C. without mentioning them?

It does not require citation of authority to establish that private roads or ways are not under the jurisdiction of the Act so this must also include private ferries.

Perhaps, Congress meant to include "public ferries" when they were legally and in fact "public ferries" and when they were actual continuations of, or necessary links, in public highways. But Congress never meant to include the situation present in this case where:

One. The ferry held no franchise, license, or permit and was a privately owned ferry.

Two. The ferry did not exist for, or in aid of a continuation of any highway, nor as a way of necessity.

In the instant case, it is stipulated of record that a carrier may operate or serve an entire reservation of the United States government even though beyond the particular territory authorized in its certificates as long as no public highways are used in the beyond operation. Here United had authority expressly contained in its certificate to serve all of Benton County, Washington, to the middle of the Columbia River. Consequently, the ferry was not used in the sense of being a public highway but merely as a method of serving the entire reservation which existed on both sides of the

river. The trial court was perhaps impressed by the fact that Section 306 (a) says "on any public highway or within any reservation under the exclusive jurisdiction of the United States." The Commission has traditionally left authorization to operate over reservation roads up to the reservation authorities. Their only requirement is that "public highways" be not traversed *outside* the reservation limits or certificated authority. They never intended that a technical interpretation to what was obviously only a means of getting around the reservation, such as this ferry, be applied to their ruling.

Having demonstrated that the judgment below was erroneous, we respectfully submit that this Honorable Court should reverse it with instructions to the lower court that the order denying the Motion for Dismissal be vacated and the motion granted.

Respectfully submitted,

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